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IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

RACHEL AGOSTINI, *et al.*,
Petitioners,
and

CHANCELLOR OF THE BOARD OF EDUCATION OF THE
CITY OF NEW YORK, *et al.*,
Petitioners,
v.

BETTY-LOUISE FELTON, *et al.*,
Respondents

On Writ of Certiorari To The
United States Court of Appeals
For The Second Circuit

**BRIEF OF THE BECKET FUND FOR
RELIGIOUS LIBERTY AS *AMICUS CURIAE*
IN SUPPORT OF PETITIONERS**

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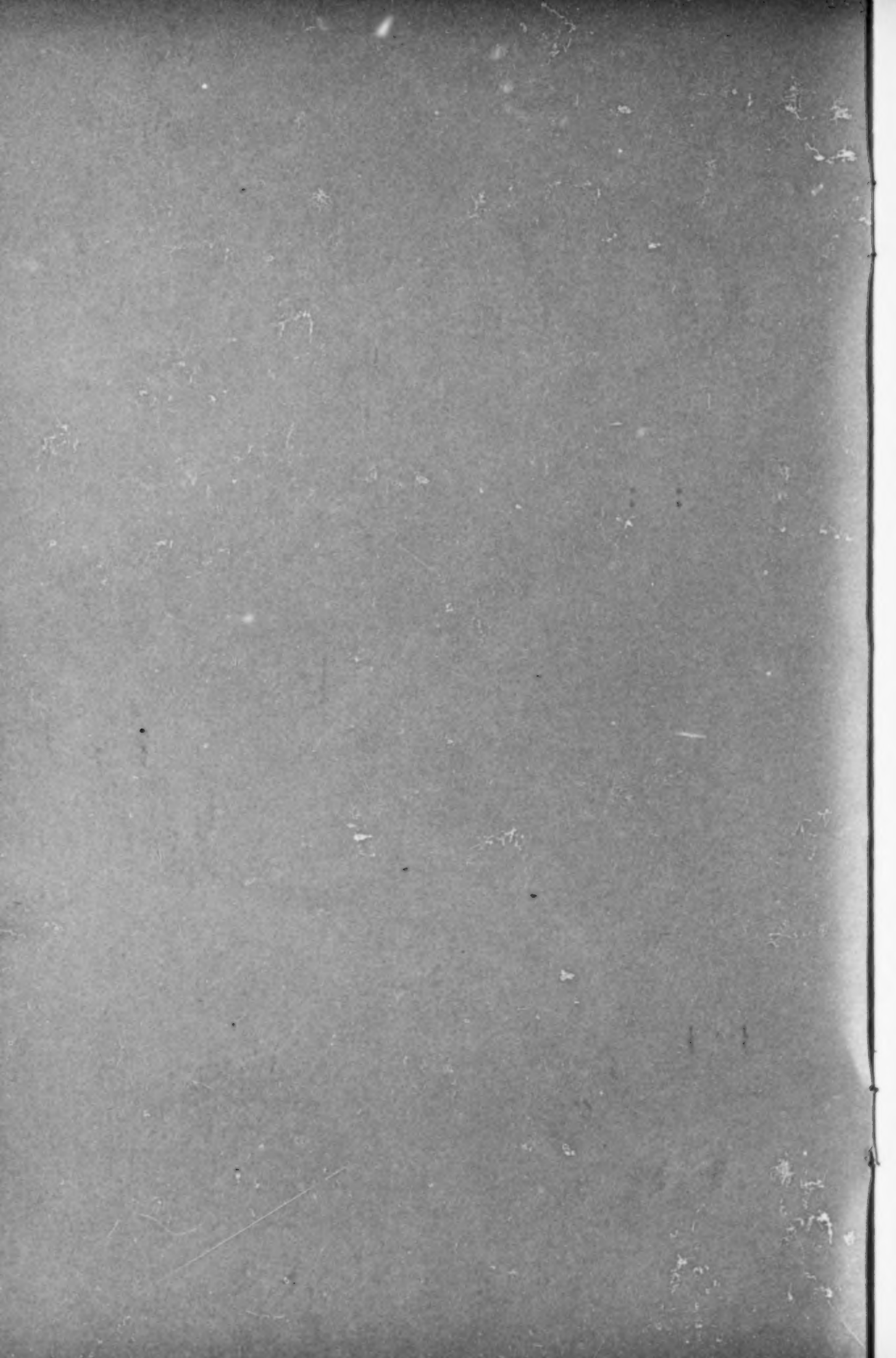


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INTEREST OF THE *AMICUS*

Pursuant to Rule 37.3 of this Court, the Becket Fund for Religious Liberty respectfully submits this brief *amicus curiae* in support of Petitioners.¹ The Becket Fund is a bipartisan and ecumenical public interest law firm that protects the free

¹ All parties have consented to the filing of this brief. Letters of consent from all parties have been filed simultaneously with this brief.

expression of all religious traditions. Our cases frequently involve allegations of improper entanglement under *Aguilar v. Felton*, 473 U.S. 402 (1985). For example, we are currently preparing a petition for writ of certiorari in a case that will be captioned *Schundler v. ACLU*. In that case, the Third Circuit held, among other things, that a city's policy of including a broad array of religious elements—from a Hanukkah Menorah to a Hindu parade—in its various cultural offerings, and accompanying all such cultural efforts with a sign celebrating diversity, was an unconstitutional entanglement under *Aguilar*. *Schundler v. ACLU*, No. 95-5965, slip op. (3d Cir. Jan. 13, 1997).

Our present brief will address the utility of entanglement analysis for the Court's Establishment Clause jurisprudence. Because of this focus we believe our brief will complement, and not duplicate, the briefs of the parties and thus prove helpful to the Court in its resolution of this case.

SUMMARY OF ARGUMENT

Justice O'Connor recently warned that while it "is always appealing to look for a single test, a Grand Unified Theory that would resolve all the cases that may arise under a particular clause But the same constitutional principle may operate very differently in different contexts." *Board of Educ. of Kiryas Joel Village School Dist. v. Grumet*, 114 S. Ct. 2481, 2498-99 (1994). The Court has often remarked similarly—beginning in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), itself, where the Court stressed that:

Judicial caveats against entanglement must recognize that the line of separation, far from being a "wall," is a blurred, indistinct and variable barrier depending on all the circumstances of a particular relationship.

Id. at 612.

This advice is particularly apt when it comes to entanglement analysis, which too easily leads itself to circularity—entanglement is “excessive” because it is improper, and improper because it is “excessive.” The military chaplaincy involves the government in a far greater number and complexity of contacts with religious organizations than did the zoning regulation in *Larkin v. Grendel’s Den*, 459 U.S. 116 (1982). Yet the military chaplaincy is not only constitutionally permissible, it is probably constitutionally required. By contrast, the zoning regulation in *Larkin* “enmesh[ed] churches in the exercise of substantial government powers” and was therefore held to be an establishment of religion. *Id.* at 126.

In short, which interactions between Church and State are benign, and which are “excessive entanglements,” cannot be determined reliably just from the extent of mutual contact. That conclusion depends instead on the propriety of the contact—which is itself the ultimate question in Establishment Clause analysis.

Aguilar-style entanglement analysis is unworkable for another reason. It requires inquiry into the Free Exercise rights of third parties, which taxpayer plaintiffs have no standing to raise.

The inhibition of religion is by definition not the establishment of it. Inhibition is instead its opposite. But *Aguilar’s* finding of an unconstitutional establishment of religion was based largely on the possibility that monitoring Title I teachers would inhibit religious belief and practice.

This is problematic. The specter of “state inspectors prowling the halls of parochial schools,” *Felton v. Secretary*,

United States Department of Education, 739 F.2d 48, 67 (2d Cir. 1984), *aff'd*, *Aguilar v. Felton*, 473 U.S. 402 (1985), is certainly ominous. However, it is ominous not to taxpayers, but to those whose religious freedom is thereby threatened—the parochial schools and the parents who choose to send their children to them.

But individual parochial schools are free to refuse any or all government aid which they feel is intrusive, or potentially so. Moreover, both parochial schools and their students are capable of enforcing their own Free Exercise rights should they be infringed. Taxpayer plaintiffs do not have standing to try to do it for them.

ARGUMENT

I. ENTANGLEMENT ANALYSIS SHOULD NOT BE USED AS A FREE-STANDING “TEST” UNDER THE ESTABLISHMENT CLAUSE.

A. The Court Has Emphasized That All Of Its Establishment Clause Inquiries Are “Guidelines,” Not “Tests.”

Justice O'Connor recently warned that while it “is always appealing to look for a single test, a Grand Unified Theory that would resolve all the cases that may arise under a particular clause But the same constitutional principle may operate very differently in different contexts.” *Board of Educ. of Kiryas Joel Village School Dist. v. Grumet*, 114 S. Ct. 2481, 2498-99 (1994). Accordingly, she emphasized that “the Establishment Clause, like the Free Speech Clause, cannot easily be reduced to a single test. There are different categories of Establishment Clause cases, which may call for different approaches.” *Id.* at 2499.

The Court has often made a similar point. It has stressed that "[i]n each case, the inquiry calls for line drawing; no fixed, *per se* rule can be framed." *Lynch v. Donnelly*, 464 U.S. 668, 678 (1984). See also *Walz v. Tax Commissioner*, 397 U.S. 664, 669 (1970) ("rigidity could well defeat the basic purpose" of the Religion Clauses). Thus, the Court has refused to invalidate mechanically every governmental action which somehow involves religion. Instead,

the Court has scrutinized challenged legislation or official conduct to determine *whether, in reality, it establishes a religion or religious faith, or tends to do so.*

Lynch v. Donnelly, 465 U.S. at 678 (emphasis added, citation omitted). See also *Allegheny County v. Greater Pittsburgh ACLU*, 492 U.S. 573, 591 (1989)(quoting *Everson v. Board of Educ.*, 330 U.S. 1, 15-16 (1947)).

To be sure, the Court has developed useful criteria to aid in this determination. At the same time, however, the Court has always emphasized that the utility of these criteria must be kept in perspective. The criteria "must not be viewed as setting the precise limits to the necessary constitutional inquiry, but serve only as guidelines with which to identify instances in which the objectives of the Establishment Clause have been impaired." *Meek v. Pettinger*, 421 U.S. 359 (1975)(emphasis added, citation omitted). This is true of the "principal evils" identified in *Walz*: "sponsorship, financial support, and active involvement of the sovereign in religious activity." 397 U.S. at 668. The Court has noted that their presence cannot be measured with any "constitutional caliper." See *Tilton v. Richardson*, 403 U.S. 672, 677 (1971).

It is likewise true of the three criteria collected in *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971). In *Lynch*, the Court

reminded us that it is unwilling "to be confined to any single test or criterion in this sensitive area. In two cases, the Court has not even applied the *Lemon* 'test.'" 465 U.S. at 679. Since *Lynch*, the Court's refusal to be shoe-horned into a unitary approach to the Establishment Clause has been even more pronounced. Indeed, in two recent Establishment Clause cases, the Court has not cited *Lemon*. See *Rosenberger v. Rectors and Visitors of University of Virginia*, 114 S. Ct. 2551 (1995); *Capital Square Rev. and Advisory Bd. v. Pinette*, 115 S. Ct. 2440 (1995). The Court apparently found *Lemon* unhelpful in deciding *Lee v. Weisman*, 505 U.S. 577 (1992). Even more strikingly, the Court in *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1 (1993), noted that the Court of Appeals used the *Lemon* analysis, but then did not itself mention *Lemon* anywhere else in its opinion.

And where the Court *has* chosen to use the *Lemon* criteria—even in *Lemon* itself—it has called for circumspection. This is especially true in its use of entanglement criterion:

Judicial caveats against entanglement must recognize that the line of separation, far from being a "wall," is a blurred, indistinct and variable barrier depending on all the circumstances of a particular relationship.

Lemon, 403 U.S. at 614. See also *Roemer v. Board of Public Works*, 426 U.S. 736, 766 (1976)("[t]here is no exact science in gauging the entanglement of church and state"); *Hunt v. McNair*, 413 U.S. 734, 746 (1973)("the degree of entanglement arising from inspection of facilities . . . varies in large measure with the extent to which religion permeates the institution"); *Tilton*, 403 U.S. at 685 (various factors can "substantially diminish the extent and the potential danger of the entanglement").

In sum, this Court has taught that the ultimate inquiry is “whether, in reality, [the challenged conduct] establishes a religion or religious faith or tends to do so.” *Lynch*, 465 U.S. at 678. Comparing the conduct to the “principal evils” isolated in *Walz* and to the three criteria set forth in *Lemon* may well be helpful in discerning the answer. But,

[t]here are always risks in treating criteria discussed by the Court from time to time as “tests” in any limiting sense of that term. Constitutional adjudication does not lend itself to the absolutes of the physical sciences or mathematics. *The standards should rather be viewed as guidelines with which to identify instances in which the objectives of the Religion Clauses have been impaired.*

Tilton, 403 U.S. at 678 (emphasis added). The present case provides the Court with an excellent opportunity to re-emphasize that principle and thus clarify the proper role of entanglement analysis in Establishment Clause cases.

B. Entanglement Analysis Is Especially Ill-Suited To Serve As A Separate Test Because It Assumes Its Own Conclusion.

It is not only desirable that entanglement analysis not be regarded as a free-standing “test,” it is also logically preferable. To do otherwise is to risk making a circular argument—“entanglement” is “excessive” because it is improper, and improper because it is excessive. Under this Court’s cases, it is not the *quantity* of contacts between Church and State that make for excessive entanglement; rather, it is the *quality* of such contacts that matter. The military chaplaincy involves the government in a far greater number and complexity of contacts with religious organizations than did the zoning

regulation in *Larkin v. Grendel's Den*, 459 U.S. 116 (1982). So do the various programs established by the Adolescent Family Life Act ("AFLA"). See *Bowen v. Kendrick*, 487 U.S. 589 (1988). Yet the *Kendrick* Court upheld AFLA. And the chaplaincy programs set up by the various branches of the military are not only constitutionally permissible, they are probably constitutionally required.² By contrast, the zoning regulation in *Larkin* "enmesh[ed] churches in the exercise of substantial government powers" and was therefore held to be an establishment of religion. *Id.* at 126.

A casual observer would not say, in the colloquial sense of the word, that the City of Cambridge and the church near Grendel's Den restaurant had become entangled with one another. The only contact involved was the church filing a written objection to the granting of a liquor license. *Id.* at 118. But this contact, however fleeting, "vest[ed] discretionary governmental powers in [a] religious bod[y]", *id.* at 123, and thus was held to be an excessive entanglement. The same casual observer would almost certainly say, again in the colloquial sense of the word, that the military chaplaincy and AFLA are both quite entangling. But they are not improperly so.

² See *School District of Abington Township v. Schempp*, 374 U.S. 203, 297 (1963) (Brennan, J., concurring); *Id.* at 309 (Stewart, J., dissenting); *Katcoff v. Marsh*, 755 F.2d 223 (2d Cir. 1985) (holding that chaplaincy is constitutionally required to effectuate free exercise rights of service members and to preserve neutrality under the establishment clause). Cf. *Kiryas Joel*, 114 S. Ct. at 2492 (quoting Justice Brennan's statement in *Abington* that "[H]ostility, not neutrality, would characterize the refusal to provide chaplains and places of worship for prisoners and soldiers cut off by the State from all civilian opportunities for public communion." *Abington*, 374 U.S. at 299 (Brennan, J., concurring)).

In short, which relationships between Church and State are benign, and which are "excessive entanglements," cannot reliably be determined merely from the extent of mutual contact. It depends instead on the propriety of the mutual contact—which is itself the ultimate question in Establishment Clause analysis. Accordingly, a court cannot reliably determine that a certain "entanglement" is "excessive" until after it has already decided, on some other basis, that the relationship is improper.³ It is the *substance* of the contact between church and state, and not some quantum of interactions, that is determinative.

³*Aguilar* has found itself cited in support of some unusual results in the lower courts. The Third Circuit recently cited *Aguilar*'s in striking down a display of a menorah and a creche that were part of Jersey City's year-round celebration of ethnic, cultural, and religious heritage, including such diverse events as Republic of India Day, Ramadan Remembrance Day parade, an African American Art exhibit, a Dominican Republic flag raising, and a St. Patrick's Day parade. *Schundler v. ACLU*, No. 95-5965, slip op. (3d Cir. Jan 13, 1997). The menorah and creche were accompanied, as were all of the city's cultural efforts, by a sign tying the display to a broader celebration of diversity. The court of appeals, however, relying on *Lemon* and *Aguilar*, held that Jersey City had, through its "overall plan to celebrate different religions and cultures . . . pursued a quintessential type of government action that 'fosters an excessive entanglement with religion.'" *Schundler*, Slip Op. at 26 (quoting *Lemon*, 430 U.S. at 613). A petition for writ of certiorari is currently being prepared by undersigned counsel.

Aguilar has likewise been cited in striking down regulations governing the use of the term "kosher" in consumer marketing, *Barghout v. Bureau of Kosher Meat and Food Control*, 66 F.3d 1337, 1340 (4th Cir. 1995) (although "the ordinance violated the second prong of the *Lemon* test . . . the principle defect of the ordinance lies in its creation of excessive entanglement)." Cf. *Bonham v. District of Columbia Library Admin.*, 989 F.2d 1242 (D.C. Cir. 1993) ("to close the library on Easter . . . the District would be forced to decide matters of 'deep religious significance,' *Aguilar v. Felton* . . .").

This is not to say that the entanglement criterion is simply a makeweight. It is not. Rather, it provides a valuable perspective on the totality of the circumstances. As the Court noted in *Lemon*, "involvement or entanglement between government and religion serves as a warning signal [in advance of] where the 'verge' of the precipice lies." *Lemon*, 403 U.S. at 624-25. A high degree of interaction between church and state is a helpful clue in a court's investigation. But it cannot be pressed into service as a free-standing "test."

II. AGUILAR'S ENTANGLEMENT ANALYSIS IS PARTICULARLY PROBLEMATIC.

Aguilar's entanglement analysis is unworkable for another reason. It requires inquiry into the Free Exercise rights of third parties, which taxpayer plaintiffs have no standing to raise.

A. Inhibition of Religion Violates, If Anything, The Free Exercise Clause, Not The Establishment Clause.

The inhibition of religion is by definition not the establishment of it. Inhibition is instead its opposite. But *Aguilar's* finding of an unconstitutional establishment of religion turned largely on the possibility that required government monitoring of Title I teachers could lead to the inhibition of religious belief and practice, or as the Court put it, the "more than an imagined specter of governmental 'secularization of a creed.'" *Aguilar*, 473 U.S. at 414 (quoting *Lemon*, 403 U.S. at 650). The *Aguilar* Court thus found an Establishment Clause violation in large part because of the

threatened inhibition of religion.⁴

This is problematic. The specter of "state inspectors prowling the halls of parochial schools," *Felton v. Secretary, United States Department of Education*, 739 F.2d 48, 67 (2d Cir. 1984), *aff'd*, *Aguilar v. Felton*, 473 U.S. 402 (1985), is certainly ominous. However, it is ominous not to taxpayers, but to those whose religious freedom is thereby threatened—the parochial schools and the parents who choose to send their children to them. Had the monitoring hindered the religious beliefs or practices of the schools at any time from the inception of the program in 1966, they could have brought suit under the Free Exercise Clause. As it is, neither the schools nor the schoolchildren's parents believe their religious liberty to be in peril. In fact, both the schools and parent-intervenors have defended the program from the beginning.

B. Taxpayer Plaintiffs Lack Standing To Assert The Free Exercise Rights Of Third Parties.

Aguilar thus presents the unusual circumstance of taxpayer plaintiffs bringing a challenge to a government program, and prevailing, not because the challenged program established, aided, preferred, or endorsed religion, but because it was said to threaten the religious liberty of third parties—who could not have disagreed more.

That result is in considerable tension with this Court's

⁴While the Court noted in dicta in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 532 (1993), that "[i]n our Establishment Clause cases we have often stated the principle that the First Amendment forbids an official purpose to disapprove of a particular religion or of religion in general," the Court has never found an establishment based on disapproval—except in its entanglement analysis *a la Aguilar*.

established doctrine on standing. Interested would-be plaintiffs cannot acquire standing by virtue of some "shared individuated right to a government" that does not prohibit the free exercise of religion. See *Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464, 482 (1982). Article III requires a real or threatened injury. *Id.* at 472. *Flast v. Cohen*, 392 U.S. 83, 104 n.25 (1968), expressly declined to decide whether an assertion of the free exercise claims of third parties would be sufficient to confer taxpayer standing. And in *McGowan v. Maryland*, 366 U.S. 420 (1961), the Court rejected an attempt by plaintiffs to raise the free exercise rights of third parties. In that case, the Court held that appellants lacked standing because they

allege[d] only economic injury to themselves; *they [did] not allege any infringement of their own religious freedom due to Sunday closing*

McGowan, 366 U.S. at 429 (emphasis supplied).

So too here. Plaintiffs' anxiety for what are best characterized as the free exercise rights of nonpublic schools and their students is misplaced. Individual parochial schools are free to refuse any or all government aid which they feel is intrusive. Moreover, both parochial schools and their students are certainly capable of enforcing their own Free Exercise rights should they be infringed. Taxpayer plaintiffs have no standing to try and do it for them.

In short, entanglement analysis, in general, is ill-suited for service as an Establishment Clause test, and *Aguilar's* version of it particularly so.

CONCLUSION

For the foregoing reasons, the decision of the Court of Appeals for the Second Circuit should be reversed, and *Aguilar v. Felton* overruled.

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